



Strategic Partnering

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Partnering Advantages

- To Bigco:
 - Shortening of the development cycle
 - Lower development cost
 - Developmental risk management
 - Entrepreneurial talent and technology expertise
 - Moves R&D off balance sheet
 - Pre-acquisition comfort

Partnering Advantages

- To Smallco:
 - Less dilution and more control over management
 - Lower development cost, access to funds
 - Development focus, technology validation
 - Credibility and stability
 - Operational benefits, Expertise

Partnering Disadvantages/Risks

- To Smallco:
 - Loss of total control
 - Time requirements to close
 - Lack of commitment or narrow focus by Bigco
 - Cannibalization of core business
 - Restrict future growth, limit or foreclose other funding or acquisition

Partnering Disadvantages/Risks

- To Bigco:
 - Lack of total control over Smallco employees or development
 - Limited control over return on investment
 - Dependence on small, unstable company
- To Both:
 - Cultural incompatibility
 - Decreased flexibility, dependence on partner
 - Management distraction, misalignment of management incentives

The Partnering Process

1. Find a partner
2. First contact: Find the right person; Personal contacts; Introductory letters
3. Non-confidential information to interested parties
4. Preliminary meetings
5. NDA and exchange of confidential information
6. Scientific/technical meetings; Business discussions
7. Term sheet; Due diligence
9. Negotiation of agreement(s)

Identifying Potential Partners

- Track record of product successes, market reputation
- Collaboration reputation and track record; Culture
- Development expertise, speed to market, sales force
- Likelihood to close deal
- Evaluate fit (complementary or competitive), strategic value of your technology to the partner
- Potential candidate for merger or acquisition?
- The selection process should continue throughout the period of negotiations
 - Maintain competitive alternatives, avoid exclusive negotiations and other restrictions

Understand Objectives

(of both partners)

- Access to new technologies or skill sets?
- Access to domestic and/or international distribution channels, customers?
- Accelerate expansion of manufacturing capacity?
- Risk Sharing?
- Funding?
- Prelude to Acquisition?
- Competitive considerations?
- Validation -- of technology, market credibility?
- Marketing and sales force, experience and reputation?

Broad Issues

- Internal selling, buy-in
- Understand partner's players and approval process
 - Champions, opponents
 - Decision makers, who has authority
- Compatible objectives
- Mutual on-going incentives, alignment at every stage or outcome
- Flexibility for long-term
- Understand each partner's (and the assets') SWOT
 - **S**trengths, **W**eaknesses, **O**pportunities, **T**hreats

Due Diligence Issues

- Thorough review of IP, contracts, legal actions
- Confidentiality, NDA (mutual, time, scope)
- Remember that during due diligence, it's not "business as usual" for Smallco
 - Disruption to Smallco
 - Time (production of documents; meetings)
 - Legal and accounting cost to Smallco
 - Ego (Bigco challenges to Smallco strategy, tactics)

Communication

- Face-to-face meetings are critical
- Good communications during the negotiations, with trustworthiness, integrity and creativity, lay the foundation for a great relationship
- Both companies need people at the right level, both going in and ongoing, of: Seniority; Authority; Personality; Commitment; Availability
- Establish processes in the agreement that facilitate frequent, ongoing communication

Scope of Rights

- Exclusive/nonexclusive
- Fields of use
- Geographic (territory) limitations
- Durational use limitations
- Permitted activities (R&D, "make, use, sell")
- Cross-licensing or grant back
- Manufacturing and supply rights
- Additional product rights: Right of first refusal on new developments; Additional license or distribution rights in new areas
- Co-promotion rights

Intellectual Property

- During due diligence: differing views on validity and scope and on clean-up needed; ("battle of the experts")
- Rights in developed technology, improvements
 - Follow inventorship
 - Follow strategic interest
 - Joint or solely owned, with allocation via licenses, assignments
- Patent rights (who is responsible, who pays, recovery, step-in rights)
 - Prosecution and maintenance
 - Enforcement
 - Infringement

Financial Terms

- Upfront fees
- R&D funding (development fees)
- Milestone Payments
- Royalties
- Profit Sharing
- Transfer fees
- Sublicense fee sharing
- Stock purchase
- Be mindful of tax implications
- Reporting, accounting, audit rights

Setting Financial Terms

- Size of market for the product
- Potential market share (competitive products on the market and in development)
- Stage of development
- Research comparables
- Valuation consultants & valuation methodologies
- Negotiate with multiple parties
- Assess cost, time to market, risk, return (patent life, competition, prices, revenues, etc.)

Governance and Decision Making

- Committees
 - Product Development, Joint Commercialization, Steering, Patent Strategy
 - "Jurisdiction" of committees and subcommittees
 - Governance and decision making (management and scientific, inter- and intra-level coordination and communication)
 - Dispute resolution: clear mechanism, channels, responsibility, deadlines
- Careful re antitrust issues (e.g., pricing in distribution agreements)

Diligence, Termination

- Diligent development, commercialization
 - General (commercially reasonable) vs. specific deadlines
- Termination triggers
 - Failure of diligence, other uncured breach
 - Elective, milestone failures, competition
 - Deadlocks
 - Change of control
- Rights upon termination
 - Continuing license to terminating party (if for cause)
 - Sale of inventory
- Remedies other than termination

Dispute Resolution

- Lower-level forced to try to resolve first, report to higher-ups if they can't ("embarrassment brings resolution")
- Senior executives confer (escalate to point where pain of dispute exceeds pain of resolution)
- Mediation?
- Litigation vs. arbitration
 - Reserve the right in arbitration provisions to resolve intellectual property issues in court
 - Injunctive relief
 - Time, cost (money, management time)
- Choice of law, location, regime

Other Terms

(But not "boilerplate")

- Representations and warranties
- Indemnity and insurance
- Limitation of liability
- Non-competes, carve-outs
- Confidentiality, Publicity
- Assignment
- Force majeure

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